Supreme Court, U.S.
FILED
AUG 22 2002
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(2)

No. 02-124

IN THE

# Supreme Court of the United States

JAMES W. SIKES and FELIX KEMP,

*Petitioners,*

*v.*

AT&T CORP.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION

WYCK A. KNOX, JR.
TED H. CLARKSON
KILPATRICK STOCKTON LLP
Post Office Box 2043
Augusta, GA 30903
(706) 724-2622

LAURA A. KASTER
AT&T CORP.
295 North Maple Avenue
Room 1138L2
Basking Ridge, NJ 07920
(908) 221-4838

WILLIAM N. WITHROW, JR.
*Counsel of Record*
C. LEEANN MCCURRY
TROUTMAN SANDERS LLP
5200 NationsBank Plaza
600 Peachtree Street
Atlanta, GA 30308-2216
(404) 885-3000

*Attorneys for AT&T Corp.*

175799

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

36 pp

## STATEMENT PURSUANT TO RULE 29.6

Respondent, AT&T Corp. (formerly known as American Telephone & Telegraph Company), has no parent corporation and no publicly held company owns 10% or more of its stock.

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## RESPONDENT'S BRIEF IN OPPOSITION

The Petition for a Writ of Certiorari should be denied because the decision below represents a routine application of settled law and does not present any issue of general importance. The Eleventh Circuit decertified the class in this case because the district court's certification ruling disregarded binding Eleventh Circuit law rendered in a related case that the district court could not eliminate elements of each plaintiff's claim by entertaining class-wide presumptions of reliance and injury in order to justify class treatment. The district court also ignored any impediment to class certification presented by its own determination that the case required the application of all fifty states' gambling laws. Instead, the district court improperly entertained the legal fiction that all states' gambling laws were similar. The Petition should be denied because the Eleventh Circuit's decision neither conflicts with the decisions of any other Circuit nor raises any issue that implicate the supervisory power of this Court as Petitioners erroneously assert.

## INTRODUCTION

This is the third of three related putative class actions that have met the identical fate — decertification by the Eleventh Circuit Court of Appeals. Each case asserted a nationwide class to challenge the legality of certain 900-number telephone programs. *Andrews v. AT&T* challenged all 900-number programs that offered a chance to win a prize, while *Harper v. AT&T* attacked all 900-number programs involving credit cards or credit services.[1] In this case, Petitioners James W. Sikes and Felix Kemp ("Petitioners") challenged a particular 900-number program encompassed within the *Andrews* class definition, the "Let's Make A Deal" ("LMAD") program.

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1. The *Andrews* and *Harper* actions were effectively consolidated for class certification purposes and are hereafter collectively referred to as "*Andrews*."

Each of these actions claimed that AT&T Corp.'s ("AT&T") provision of billing and collection services for the described 900-number programs constituted, among other things, mail and wire fraud and/or illegal gambling.[2] In each case, the district court certified nationwide classes and, because otherwise the litigation would have been unmanageable, adopted various "presumptions" to eliminate the need for the individual proofs required to establish each class member's claim. Thus, the district court adopted a presumption that each and every class member had justifiably relied on a misrepresentation in deciding to call the 900-number programs. Similarly, despite the fact that there were extensive refunds and credits made to those billed for calls to the 900-number programs at issue, to permit class certification, the district court was willing to presume that each and every class member had suffered a compensable injury. Further, although the district court recognized the necessity of applying the gambling laws of all fifty states, it assumed that these various states' laws would be sufficiently similar to allow the cases to be effectively managed. (R13-291-Ex.2-28-30; R5-142-8, 10-11).

The Eleventh Circuit reversed the district court's certifications, first in *Andrews v. AT&T*, 95 F.3d 1014, *reh'g denied en banc*, 104 F.3d 373 (11th Cir. 1996), which the representative plaintiffs did not pursue before this Court. Then, five years later, the Eleventh Circuit followed the *Andrews* ruling and reversed the district court's certification in this case. *Sikes v. Teleline*, 281 F.3d 1350, *reh'g denied en banc*, 2002 U.S. App. LEXIS 10585 (11th Cir. 2002).

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2. The complaints in each case asserted claims under the Federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*; the Federal Communications Act ("FCA"), 47 U.S.C. § 201, *et seq.*; and the Georgia RICO Act, O.C.G.A. § 16-14-1, *et seq.* Also named as defendants in this action were Teleline, Inc. ("Teleline"), the sponsor of the LMAD program, and U.S.A. Networks ("U.S.A."), which broadcast certain LMAD advertising. (R1-1-¶ 6-9; R5-142-1, 4, 7).

Despite the articulation of the questions presented, the Petition is simply a challenge to the ordinary application of the proper standard of review for class certification decisions. Indeed, Petitioners concede that the Eleventh Circuit properly articulated that standard but complain that in practice it applies an "essentially plenary *de novo* review" to class certification orders. (Petition at 10). However, the review standard and its application were patently correct because, as even the district court itself recognized, the fundamental issues underlying its certification orders were questions of law — whether it could adopt the substantive law presumptions it found were needed to justify class treatment and to facilitate certification under Rule 23. (R13-287-3). The Eleventh Circuit's recognition that "'[a] district court abuses its discretion if . . . it applies the wrong legal standard . . . ,'" is consistent with the review standards applied by all of the Circuit Courts of Appeals. *Sikes*, 281 F.3d at 1359 (citation omitted); *see* p. 12, *infra*. Further, Petitioners' suggestion that there should be a presumption in favor of certification (Petition at 11, 15-16) is contrary to this Court's instruction that "actual, not presumed" compliance with the requirements of Rule 23 is "indispensable." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

Second, Petitioners are flatly wrong when they contend that the Eleventh Circuit's refusal to allow reliance to be presumed on a class-wide basis conflicts with established law. (Petition at 16). The overwhelming weight of authority has unequivocally rejected the notion that it is appropriate to presume reliance outside the context of securities fraud. *See, e.g., Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561, *reh'g denied en banc*, 228 F.3d 411 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) ("No court has accepted the use of [the fraud on the market] theory outside of the context of securities fraud . . ." and rejecting the use of a presumption of reliance in a RICO claim predicated on fraud); *see* p. 17, *infra*. Petitioners' contention that the consequence of the Eleventh Circuit's decision is to deny the use of

circumstantial evidence to establish fraud claims is directly refuted by the decision itself, which states that its ruling does not mean that only direct evidence, and not circumstantial evidence, may be used to establish reliance. *Sikes*, 281 F.3d at 1363 n.32.

Petitioners' final question articulates an issue that is simply not presented by the Eleventh Circuit's decision, and is based on the erroneous assumption that the Eleventh Circuit adopted a *per se* rule that any case requiring the district court to apply the laws of all fifty states precludes class certification. (Petition at 24). However, the Eleventh Circuit did not adopt any such *per se* rule. Nor did Petitioners contend before the Eleventh Circuit that if all fifty states' gambling laws applied, the case nevertheless would be manageable. Instead, Petitioners argued that the district court had erred by finding that all fifty states' gambling laws applied, when it should have applied, at most, the gambling laws of four states. As the Eleventh Circuit recognized, however, because Petitioners failed to file a cross-appeal on this choice of law issue, it had not been preserved for review. *Sikes*, 281 F.3d at 1367 n.44.

Because the Eleventh Circuit properly applied well-established legal principles in reversing the district court's class certification order, the Petition presents no issue warranting this Court's review or consideration.

## COUNTERSTATMENT OF THE CASE[3]

AT&T provided early 900-number services as a common carrier.[4] (R19-143-48-49). Pay-per-call, or "900-number,"

3. Because the Statement of Facts set forth in the Petition seriously misrepresents portions of the record, AT&T provides this Counterstatement, setting forth the facts pertinent to the district court's class certification decision.

4. The tariffs filed with the FCC that govern AT&T's provision of such services carry the force of law. *See, e.g., AT&T v. Central Office Tel. Inc.*, 524 U.S. 214 (1998).

telephone services were introduced in the early 1980s to measure caller reaction to particular events or issues (such as presidential debates) and to "broadcast" recorded, non-interactive messages to callers. These services rapidly expanded to include a wide range of "interactive" programs offering information on sports, weather, medicine, news, entertainment, and finance. (R19-143-39-40). Eventually, some message providers or sponsors unfortunately offered programs that were of questionable value or offensive to some people (*e.g.*, "Dial-A-Porn" programs) (R19-143-94); however, as a common carrier, AT&T was prohibited from denying transport service on the basis of message content.

Concerned that dissatisfaction with objectionable 900-number programs would undermine consumer confidence in regular long distance service, and in reliance on FCC decisions holding that billing and collection services need not be offered pursuant to tariff,[5] AT&T amended its 900-number tariff to separate the common carrier transport function from the billing and collection function. (R19-143-38-39, 93-94). Under these new arrangements, AT&T charged the program sponsor for the calls on a tariffed basis, and the sponsor in turn charged the callers for the information service. That sponsor-set, untariffed charge was then included by AT&T on the callers' telephone bills. (R19-143-43, 45). AT&T provided this billing service to the sponsor under a separate contract, generally for a minimal fee of between five and ten percent of the sponsor's charge. (R19-143-41-44, 49). AT&T only provided untarriffed billing and collection services to sponsors who agreed to comply with AT&T's 900-number program guidelines.[6] (R19-143-51-52, 95; R5-140-tab 27).

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5. *See, e.g., In the Matter of Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986), *recon. denied*, 1 F.C.C.R. 445 (1986).

6. The 900-number guidelines AT&T created have served as a model for later efforts by federal and state lawmakers to control 900-
(Cont'd)

The Let's Make A Deal ("LMAD") program operated from early 1990 until December 1992. AT&T terminated billing and collection services for LMAD in December 1992 when it discovered that Teleline had failed to submit the majority of its LMAD advertising and message scripts for review as required by AT&T's guidelines. (R19-143-53, 61). Teleline then sued AT&T for terminating its billing and collection services. (R19-143-61, 112, 116-17).

LMAD was generally modeled on the television show of the same name and involved players answering questions and choosing "doors" in an effort to win a prize. After a win, players could stop playing or could continue the game and try for the top prize. A new game began every calendar month, and updated rules regarding the program were issued when necessary. (R19-143-148-49).[7] Teleline created the advertising and audio message heard by callers to the programs, identified possible markets and placed the advertising, developed the computer programming necessary for running the programs, and managed and operated the programs. (R19-143-137-46, 155).

Teleline submitted for AT&T review its initial advertising, the text of the initial message script to be used, and written legal opinions that that the LMAD game complied with all applicable federal and state laws. (R19-143-56, 148; R5-140-tab 27). However, the LMAD advertising was changed over

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(Cont'd)

number program content and advertising. *See, e.g.*, 47 C.F.R. § 64.1501, *et seq.* (regulations governing 900-number programs promulgated by the FTC and FCC pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 47 U.S.C. § 228; 15 U.S.C. § 5701).

7. Petitioners notably fail to inform the Court that individuals were not required to call a 900-number in order to play the LMAD game and that Teleline provided a toll-free number for individuals to call with questions about the game. Indeed, in the last six months of operation, some 20,200 individuals used the free mail-in alternative to play, and some 102,900 persons called the LMAD 800-number. (R19-143-152).

time, and the LMAD game was advertised through multiple media outlets[8] using multiple messages. Further, the game's structure varied significantly over time. (R19-143-138-39, 143, 151; R5-140-tabs 3, 7).

AT&T provided three services in connection with LMAD. (*See* R19-143-91, 137-40, 143-45, 164-65). AT&T carried calls to LMAD's 900-numbers for a tariffed charge and supplied Teleline with call termination services, which in effect constituted the "answering machine" for LMAD. (R19-143-55, 57-58, 91).[9] The recorded messages, however, were devised by Teleline. (R19-143-155-56). AT&T also provided billing and collection services pursuant to contract for a fee of six percent of Teleline's charges to callers. (R19-143-49). As part of this service, AT&T provided "billing inquiry" that enabled individual callers with billing questions or complaints about the program or its charges to contact an AT&T service representative at an 800-number and, if dissatisfied, to obtain a refund or credit. (R19-143-98).

AT&T was not, however, as Petitioners assert, the only entity to handle consumer complaints or requests for refunds. (Petition at 5). Consumers could, and did, procure refunds and adjustments for 900-number calls to LMAD from local exchange carriers and Teleline. (R19-143-101-02, 150-51). Because local exchange carriers tracked 900-number refunds only on a collective basis, and not by the individual caller receiving a credit or refund of charges, the district court acknowledged that

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8. Although Petitioners imply that the LMAD game was advertised exclusively through television commercials on U.S.A. network, the evidence is undisputed that, in addition to 30 second commercials, two minute commercials, and 30 minute infomercials on U.S.A., the LMAD game was also advertised through print media (such as the National Enquirer and newspapers), and direct mail solicitations. (R19-143-131, 138-46, 151, 160-61, 165-68; R5-140-tab 30).

9. Teleline also obtained call termination service from other vendors. (R5-149-143).

there is no way to determine which class members actually paid for calls to LMAD or received refunds from the local exchange carriers. (*See* R19-143-67-68, 98-100, 103, 106-07).[10]

Although Mr. Sikes and Mr. Kemp seek to represent a class of all individuals who have been billed for calls made to LMAD (R3-89-14), neither actually called LMAD or played the LMAD game. (R19-143-9, 22). Instead, their charges were generated by children — Mr. Sikes' son and Mr. Kemp's grandson. (R19-143-9-10, 19). Prior to receiving their telephone bills, Mr. Sikes and Mr. Kemp had never seen any advertisements for LMAD. (R19-143-14, 22). Neither can identify what advertisement, if any, the children saw, whether the children called LMAD in response to an advertisement or even what might have been false, deceptive or misleading in any such advertisement. (R19-143-15, 23). Additionally, Mr. Sikes has never paid for any calls his son made to LMAD. (R19-143-14, 22-23).

The district court certified a nationwide class in this case consisting of all persons who had been billed for calls made in connection with LMAD and who had not received cash prizes exceeding the charges incurred for such calls. (R5-142-12). In certifying the classes, the district court rejected AT&T's claim that individual issues of reliance, injury and damages, and the need to apply the gambling laws of all fifty states, precluded certification. Rather, the district court:

> (1) expressly recognized that detrimental reliance was an essential element of Petitioners' RICO claims predicated on mail and wire fraud, but concluded that the necessity of proving individual reliance did not preclude class treatment because such reliance could be "virtually presumed;"

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10. In this case, over $2 million in refunds and uncollectible debt for LMAD was booked by AT&T but never repaid by Teleline. (R19-143-105-06).

(2) dispensed with any requirement that class members prove that they had suffered a RICO injury by paying for a call to LMAD and, although it recognized that presuming injury and damage would permit individuals who had never paid for calls to LMAD to recover damages, concluded that such a "double recovery" was permissible because it would "not significantly harm" AT&T; and[11]

(3) held that applying the varying gambling laws of all fifty states would not predominate over common issues because the application of such varying states' laws "would share many common questions."

(R5-142-8, 10-11; R13-287-3). The district court denied AT&T's request for permission to pursue an interlocutory appeal of the certification decision.[12] (R5-142-14).

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11. In their most egregious misrepresentation of the record, Petitioners suggest that AT&T affirmatively conceded that "individual caller data was not needed 'to assess or calculate damages in this case,'" in order to avoid having to convert to computer format certain of its LMAD call detail records stored on microfiche. (Petition at 8). The record, however, is patently clear that AT&T consistently asserted that the LMAD call detail report could not be used to establish damages because it did "nothing other than identify an amount billed to a particular telephone number. It does not establish that any class member in fact paid for a call, how much a class member paid for a call, or whether the class member received a refund." (Petition App. 118). Because the call detail data, at most, could be used to establish the gross revenues for the LMAD program, a number to which AT&T was willing to stipulate, it argued that there was no need to incur the tremendous expense of converting this data to a computer format. (*Id.*).

12. Because the order also improperly required AT&T to pay one-half of the costs ($225,000.00) associated with providing the class with notice by publication, AT&T directly appealed the certification order (Cont'd)

Thereafter, the district court entered a virtually identical order certifying nationwide classes in *Andrews*. (R13-291-Ex.2-28-30). However, recognizing that its certification order was of "nationwide significance" and that there could be "a substantial ground for difference of opinion," the district court authorized the defendants in *Andrews* to seek interlocutory review of its decision. (R13-291-Ex. 2-34-35).

The Eleventh Circuit granted the interlocutory petition in *Andrews* and reversed the district court's certification of the plaintiff classes. *Andrews v. AT&T*, 95 F.3d 1014, *reh'g denied en banc*, 104 F.3d 373 (11th Cir. 1996). In particular, recognizing that class treatment could not be used to alter the substantive proof required to succeed on a claim for relief, the Eleventh Circuit rejected the district court's attempt to satisfy the predominance requirement of Rule 23(b)(3) and render the litigation manageable by presuming that each class member justifiably relied on a misrepresentation, and suffered a compensable injury as a result. *Id.* at 1025. Similarly, the Eleventh Circuit rejected the district court's unfounded assumption that the gambling laws of all fifty states were sufficiently similar to justify class treatment. *Id.* at 1024. The representative parties in *Andrews* did not seek this Court's review of the Eleventh Circuit's decision.

Following the Eleventh Circuit's decision in *Andrews*, AT&T moved to decertify the instant action. The district court denied AT&T's motion, concluding that *Andrews* did not preclude continued class treatment in this case or the use of presumptions to establish the essential elements of reliance, injury and damage. *Sikes v. AT&T*, 179 F.R.D. 342, 346-47

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under the collateral order doctrine. (R5-144-1). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). This appeal was subsequently dismissed as moot after the district court vacated that portion of its order imposing notice costs on AT&T. (R5-165-1; R6-172-1).

(S.D. Ga. 1998). Instead, it distinguished *Andrews* on the basis that it involved a number of different 900-number programs, while this case involved only one 900-number program. *Id.* Moreover, although the district court explicitly recognized that the majority in *Andrews* "expressed reservations concerning the manageability of undertaking inquiries into the laws of all fifty states absent a thorough analysis of the various state laws by the class proponents," it again concluded that such a pre-certification analysis of all fifty states' gambling laws was unnecessary in this case. *Id.* at 348.

The district court subsequently certified its decision for interlocutory appeal, and the Eleventh Circuit again reversed, rejecting the district court's attempts to distinguish *Andrews* and holding that because *Andrews* "rejected the propriety of allowing a presumption that would relieve plaintiffs of their burden of having to prove every element of a claim . . . we must do the same in this case." 281 F.3d at 1362. The Court also concluded that the district court's bases for employing the various presumptions were erroneous. *Id.* at 1362-64. Specifically, the Eleventh Circuit held that because class members, and not AT&T, controlled any evidence as to whether they relied on a misrepresentation or suffered an injury as a result of such reliance, there was no basis for presuming the elements of reliance, injury or damage, and further, because not all of the LMAD advertising was available and Petitioners' expert testified that the available advertisements varied "'in terms of their potential to deceive,'" no presumption that all LMAD advertising was misleading could be employed. *Id.* at 1362-65.

Petitioners seek review by this Court claiming that the Eleventh Circuit (1) fails to accord sufficient deference to district court certification decisions and, in particular, district court findings regarding the superiority and/or manageability of class actions (Petition at 10-11); (2) broke with common law principles when it refused to permit the essential element of

reliance to be presumed in a civil RICO action predicated on fraud (Petition at 16); and (3) improperly adopted a *per se* rule that the necessity of applying the laws of all fifty states necessarily precludes a finding of superiority under Rule 23. (Petition at 24). Points 1 and 2 reflect incorrect statements of accepted law, and point 3 misstates the Eleventh Circuit's ruling.

Because the Eleventh Circuit's decision in this action presents no novel issue, but applied settled law to unique facts; does not implicate any issue on which there is a conflict in the Circuits; and reflects no issue of national importance, Petitioners have presented no issue that warrants review by this Court.

## REASONS FOR DENYING THE WRIT

### I. There Is No Conflict Among The Circuits Regarding The Appropriate Standard Of Review For District Court Certification Orders.

As this Court has recognized:

> [b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules.

*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Thus, in reviewing district court certification orders, the Circuit Courts agree that while the decision to certify a class rests in the sound discretion of the district court, that discretion must be exercised within the confines of Rule 23. *Sikes*, 281 F.3d at 1359; *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001); *Coleman v. GMAC*, 2002 U.S. App. LEXIS 14644, *4-5 (6th Cir. 2002); *Spence v. Glock, GES. m.b.H*, 227 F.3d 308, 310 (5th Cir. 2000). Because "actual, not presumed"

compliance with the requirements of Rule 23 is "indispensable," *Falcon*, 457 U.S. at 160, there cannot be, as Petitioners claim, a presumption in favor of class certification. (Petition at 5). Rather, district courts are required to undertake a "rigorous analysis" of the factual and legal issues comprising a plaintiff's causes of action in order to ensure that the requirements of Rule 23 are actually met. *Falcon*, 457 U.S. at 160-61; *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (Rule 23's predominance inquiry focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy"). Appellate review of a certification decision therefore appropriately focuses — as the Eleventh Circuit did here — on whether the class as certified meets all of the applicable Rule 23 requirements. *In re: LifeUSA Holding*, 242 F.3d 136, 144 (3d Cir. 2001).

The Eleventh Circuit properly recognized that it must defer to a district court's certification decision when it has "properly exercised its discretion within the parameters of Rule 23" in certifying a class. *Sikes*, 281 F.3d at 1359; *see also Andrews*, 95 F.3d at 1022. However, the Eleventh Circuit also has recognized its obligation to review *de novo* district court determinations regarding purely legal issues that underlie a discretionary certification decision. *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir.), *cert. denied*, 122 S. Ct. 51 (2001) ("conclusions of law that informed" district court's certification decision reviewed *de novo*). And where a district court "applies the wrong legal standard" in certifying a class, the Eleventh Circuit recognizes that it has necessarily abused its discretion. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 238 F.3d 1300, 1308 (11th Cir. 2001).

The review standard, as articulated and applied by the Eleventh Circuit, is entirely consistent with the standard of review utilized by all other Circuit Courts of Appeals to address the issue. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (district court abuses discretion in

certifying class if it "adopts an incorrect legal rule"); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1349 (2002) ("'the failure to follow the proper legal standards in certifying a class . . . is an abuse of discretion'") (citation omitted); *In re: LifeUSA Holding*, 242 F.3d 136, 143-44 (3d Cir. 2001) (district court's certification decision premised on "an errant conclusion of law or an improper application of law to fact" is an abuse of discretion); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (district court's discretion to certify class "must be exercised within the framework of Rule 23"); *James v. City of Dallas*, 254 F.3d 551, 562 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 919 (2002) (certification will be reversed if district court abuses its discretion or applied an incorrect legal standard in reaching its decision); *Barney v. Holzer Clinic*, 110 F.3d 1207, 1213 n.9 (6th Cir. 1997) ("A district court that either uses the wrong legal standard or misapplies the correct legal standard abuses its discretion"); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) ("A court abuses its discretion if its certification order is premised on legal error"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 826 (10th Cir. 1995) ("If the lower court did not apply an improper standard, the court's decision is reviewed for an abuse of discretion").

This case represents a routine application of this accepted standard to the facts of this case. The Eleventh Circuit recognized that the district court's certification turned on certain conclusions of law — that the court could (1) employ certain evidentiary presumptions in evaluating Rule 23's requirements of predominance and superiority; and (2) assume that the gambling laws of all fifty states could be manageably applied, even though neither Petitioners nor the district court had ever analyzed the differences among the states' laws. *Sikes*, 281 F.3d at 1359-60 ("While we do not dispute that manageability is generally an issue of fact and practicality and not one of law, we cannot overlook the fact that the district court reached its conclusions on manageability based upon a faulty legal

premise"). The Eleventh Circuit appropriately reviewed these legal issues *de novo*. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (whether presumption of reliance would have applied had securities fraud claim been litigated was a contested question of law); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (district court "unquestionably adopted an incorrect legal standard" when it presumed compliance with adequacy requirement in the absence of proof to the contrary); *Castano*, 84 F.3d at 741 (district court cannot accept "on faith" plaintiff's assertion that state laws do not vary); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (proponent of class certification is required to provide an "extensive analysis" of state law variations regarding all pertinent state law issues, and establish that the application of each state's law would not pose "insuperable obstacles" to class certification); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing certification following trial on the merits in part because district court impermissibly determined damages on a classwide basis in order to facilitate class treatment, when applicable state law required individualized proof of damages).[13]

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13. Although Petitioners contend that stating "reliance can be virtually presumed" was a mere "factual observation" and not a ruling of law by the district court and that it did not presume damages (Petition at 13-14), the plain language of the district court's order belies these assertions:

> I disagree with AT&T's contentions regarding the necessity of conducting individual inquiries on [the] element [of reliance] . . . . if a caller played the game and was charged more than he or she won in prizes, then the person was injured by reason of the game. The 900-numbers are not listed in any public telephone directory and are not otherwise in general circulation, so it may be reasonably assumed that the caller learned of the game and decided to play, at least in part, from the game's promotional materials

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Indeed, the district court itself expressly recognized in authorizing an appeal under 28 U.S.C. § 1292 that there were controlling questions as to whether it had applied the appropriate legal standard in certifying the class, particularly regarding its use of a presumption of reliance. (R13-287-3). *See, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir. 1987) (court reviews *de novo* questions of law certified by the district court pursuant to 28 U.S.C. § 1292).

Finally, the Eleventh Circuit's decision does not, as Petitioners claim, resolve disputed issues of fact or overturn factual findings made by the district court. (*See* Petition at 13-14). In particular, Petitioners claim that the Eleventh Circuit overruled the district court's factual determination that all of the LMAD advertising was "substantially similar enough for class certification." (Petition at 14). But the Eleventh Circuit made no such finding. Rather, the Eleventh Circuit properly concluded that the district court erred in *assuming* "that LMAD and its promotions were 'without material variation'" when it was undisputed that most of the advertising is no longer available for review[14] and Petitioners' own expert conceded that the advertisements that were available "'vary in terms of their

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> or from another person who learned of the game through those promotional materials.

(R-142-8-9); *see also* (R5-142-11-12) (district court certified class to include anyone who had "been billed" for calls to LMAD, without regard to whether they had paid for such calls, finding AT&T would not be "significantly" harmed to the extent some class members received "a double recovery").

14. Most of the advertising used for the LMAD game no longer exists. For instance, of the 119 different commercials broadcast on U.S.A., Teleline was only able to locate twelve. (R19-143-131; R5-140-tab 30). Even fewer of the print ads have been located. However, the advertising that is available definitively refutes the district court's presumption that all of the LMAD advertising was the same. (*Compare* R5-140-tabs 13, 14, 15, 29).

potential to deceive.'" *Sikes*, 281 F.3d at 1364. Thus, the Eleventh Circuit concluded:

> [t]he upshot of this is that each individual plaintiff is the only person with information about the content of the advertisement upon which he relied. Of course, a factfinder cannot determine whether an advertisement was misleading or fraudulent without knowing its content, and so each plaintiff will have to provide evidence of the particular advertisement(s) that he heard or saw. The court may not employ a presumption that all of the LMAD advertisements were misleading . . .

*Id.*

The review conducted by the Eleventh Circuit of district court certification decisions in general, and of the certification decision in this case in particular, is entirely consistent with the review standard applied by other Circuit Courts. The Eleventh Circuit's routine application of this well-established review standard presents no issue that warrants this Court's attention.

## II. The Eleventh Circuit's Refusal To Allow Elements Of A Claim To Be Presumed In Order To Facilitate Class Certification Recognized A Well-Settled Rule Of Law And Presents No Issue For Review By This Court.

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992), this Court confirmed that the "by reason of" language in 18 U.S.C. § 1964 requires that civil RICO plaintiffs prove a causal connection that includes both "but for" and "proximate" causation between a predicate act of mail or wire fraud and the claimed injury in order to recover. Consistent with this Court's decision in *Holmes*, the Circuit Courts uniformly have concluded that a civil RICO plaintiff alleging mail or wire fraud must prove that he was the target of a scheme to defraud and that he "relied to his detriment on

misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Ideal Dairy Farms v. John Labatt, Ltd.*, 90 F.3d 737, 746-57 (3d Cir. 1996); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988); *Grantham & Mann v. American Safety Prods.*, 831 F.2d 596, 606 (6th Cir. 1987); *Appletree Square I Ltd. Pshp. v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986); *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000).

Petitioners' contention that the Eleventh Circuit's refusal to presume reliance is outside the norm or precludes the use of circumstantial evidence in establishing class claims cannot be supported. Indeed, the Eleventh Circuit's position is consistent with the great weight of authority that has rejected the device of presuming the element of reliance outside of the context of securities fraud claims. *See Securities Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) (recognizing that "federal courts repeatedly have refused to apply the fraud on the market theory to state common law cases despite its wide acceptance in the federal securities fraud context"); *Summit Props., Inc.*, 214 F.3d at 561 ("No court has accepted the use of the [fraud on the market] theory outside of the context of securities fraud . . ." and rejecting its use in RICO claim predicated on fraud); *Perrone v. GMAC*, 232 F.3d 433, 439-50 (5th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (refusing to apply *Affiliated Ute*'s presumption of reliance in TILA action); *Murphy v. Sofamor Danek Group*, 123 F.3d 394, 403 (6th Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998) ("Neither the courts of Tennessee nor federal courts applying Tennessee law have held that the fraud-on-the-market theory is enough to satisfy the reliance requirement for common law purposes"); *Appletree Square I*, 29 F.3d at 1287 (refusing to presume reliance via fraud-

on-the-market theory in RICO action involving real estate; unlike the stock market, real estate market was not a "well-developed" market in which the price reflected all publicly available information); *Amaco Enters., Inc. v. Smolen*, 1995 U.S. App. LEXIS 20486, *4 (9th Cir. 1995) (finding that California Supreme Court has specifically declined to incorporate the *Affiliated Ute* presumption of reliance into California tort law, Ninth Circuit held that element of reliance could not be presumed in common law fraud claim); *Hudson v. Delta Airlines*, 90 F.3d 451, 457 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997) (class certification properly denied for breach of fiduciary duty claim under ERISA; even if a uniformly false message had been used, class members still would have to prove that they "would have deferred their retirement in the hope that they would be eligible for the Special Retirement Plan to be offered in the future. [footnote omitted] This sort of decision would necessarily have been highly individualized for each potential retiree."); *Rosentstein v. CPC Int'l, Inc.*, 1991 U.S. Dist. LEXIS 200 (E.D. Pa. 1991) (presumption of reliance cannot be made in "non-perfect" markets, such as consumer market); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207 (N.D. Cal. 1994) (even if representations regarding effectiveness of product were misleading, plaintiff's RICO claims predicated on fraud could not be certified as reliance could not be established simply by showing defendant's course of conduct; reliance was an individual, fact-specific inquiry based on a myriad of factors); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998); *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 17031 (E.D. Pa. 1990); *Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998).[15] And this Court has previously declined to review

15. Indeed, by employing presumptions of reliance, injury and damage in order to justify certification of the class, the district court effectively used the Federal Rules of Civil Procedure to alter substantive rights, a result forbidden by the Rules Enabling Act, 28 U.S.C. § 2072. *See Amchem Prods.*, 521 U.S. at 612 (courts must be "mindful that Rule 23's requirements must be interpreted in keeping with Article III (Cont'd)

Circuit Court decisions refusing to presume the element of reliance in non-securities fraud cases. *See Hudson*, *supra*, *Summit Props., Inc.*, *supra*, *Perrone*, *supra*, and *Murphy*, *supra*.

Each class member in this case would have had radically different experiences, knowledge and reactions regarding the 900-number advertising and the LMAD game. It is undisputed that neither named Petitioner ever actually called a LMAD 900-number or played the LMAD game; rather, both Mr. Sikes and Mr. Kemp seek to recover damages for calls made by children in their households. Neither Mr. Sikes nor Mr. Kemp ever saw any LMAD advertisements prior to receiving their phone bills, and they are unable to identify which advertisement, if any, their children saw, whether the children called LMAD in response to that ad, or even what might have been false, deceptive or misleading in any such advertisement. (R19-143-9-10, 14-15, 19, 22-23).

Additionally, a significant percentage of LMAD callers were repeat callers, and Petitioners' expert conceded that an individual who continued to call LMAD time after time, after receiving bills for his calls, could not show that he continued to be deceived or relied on the advertising in calling. (R19-143-81, 150, 171, 189; R14-285-Ex. A-75-77, 79-81, 129). *See, e.g., Carroll v. Cellco Pshp.*, 713 A.2d 509, 518 (N.J. Super. 1998) (fraud claims premised on similar contracts required individual proof of reliance; "a plaintiff who claimed to be defrauded but who renewed the contract for the next year would have a serious credibility problem"). Petitioners' expert also admitted that because the reasons motivating someone to call LMAD would vary from person to person, and individual consumers received different information regarding LMAD, it was impossible to determine which customers actually were

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constraints and with the Rules Enabling Act . . ."); *Alabama v. Blue Bird Body Co., Inc.*, 573 F.3d 309, 318 (5th Cir. 1978) (proof required to establish a claim can in no way hinge on whether the action is brought on behalf of a class under Rule 23).

deceived. (R14-285-Ex. A-54, 56-58, 69-72, 75-77, 79-81, 90, 94-95, 118-19, 124).[16] Thus, Petitioners' own evidence demonstrated that there was no factual basis upon which any presumption of reliance could possibly be predicated. *Strain*, 1990 U.S. Dist. LEXIS 17031, *22 (presumption of reliance inappropriate where alleged misrepresentations in advertisements for weight loss center did not occur "in a single place, at the same time, or under identical conditions").[17]

Petitioners also are incorrect in asserting that the Eleventh Circuit's decision effectively precludes the use of circumstantial evidence in establishing the element of reliance. Presuming the element of reliance is simply not the same as proving that element using circumstantial evidence. *See Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1411 (8th Cir. 1987) (while fraud may be established by circumstantial evidence, "it may not be presumed"). And the Eleventh Circuit explicitly stated that its decision *did not* mean that only direct evidence, and not circumstantial evidence, could be used to establish the element of reliance in a class action, only that this element could not be presumed. 281 F.3d at 1363 n.32.

In the absence of a presumption, whether class members reasonably relied will be dependent upon what each of them read, heard and understood, and what actions, if any, each of them took based upon such representations. Such proof would require "each class member to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed [called] in reliance of those advertisements.

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16. The district court similarly acknowledged that different reasons or motivations, entirely unrelated to the advertising used, could have influenced consumers' decisions to play LMAD. (R19-143-223).

17. The impropriety of presuming reliance is further evidenced by the fact that in *Andrews*, the district court ultimately granted summary judgment to AT&T on all of the individual plaintiffs' RICO claims predicated on fraud, finding that *none* of them could establish the essential element of reliance. *See Harper v. AT&T*, 54 F. Supp.2d 1371, 1382-85 (S.D. Ga. 1999).

[footnote omitted] There are no short-cuts." *Strain*, 1990 U.S. Dist. LEXIS 17031, *22.

The Eleventh Circuit's conclusion that reliance could not be presumed, and that conducting individual reliance inquiries would overwhelm any common issues, raises no new or novel issue of any importance; it is a straightforward application of settled law. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988) ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones."); *Castano*, 84 F.3d at 745 ("fraud class action cannot be certified when individual reliance will be an issue"); *Broussard*, 155 F.3d at 342 (because reliance is an individual issue which "'must be applied with factual precision,'" fraud claims do not provide a "'suitable basis for classwide relief'") (citation omitted); *Mulligan v. Choice Mortg. Corp. USA*, 1998 U.S. Dist. LEXIS 13248 (D.N.H. 1998) (majority view is that certification is inappropriate when individual reliance is an issue, denying certification of RICO claims predicated on fraud); *Rosentstein*, 1991 U.S. Dist. LEXIS 200; *Martin*, 156 F.R.D. 207; *Strain*, 1990 U.S. Dist. LEXIS 17031; *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998); *Cichonski v. American Inventors Corp.*, 1995 U.S. Dist. LEXIS 16563 (E.D. Pa. 1995); *Mack v. GMAC*, 169 F.R.D. 671 (M.D. Ala. 1996); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 229 (E.D. Pa. 1991).

## III. There Is No Conflict Among The Circuits Regarding The Standard For Certifying A Nationwide Class That Will Require The Application Of The Laws Of All Fifty States.

In addition to fraud, Petitioners' RICO claims also are predicated on allegations of illegal gambling. In certifying the class, the district court recognized that it would be required to apply the gambling laws of all fifty states, but nonetheless

concluded that because the required inquiries into the various state laws "would share many common questions," these individual inquiries would not predominate. (R13-287-3; R5-142-10). Petitioners, however, never provided an analysis of the various states' gambling laws; instead, the district court simply assumed that those laws would raise common questions and could be manageably applied in a class action. *Sikes*, 179 F.R.D. at 348.

The Eleventh Circuit properly rejected this unfounded assumption as a matter of law. Courts uniformly recognize the potentially overwhelming manageability problems associated with applying the laws of all fifty states. *See Castano*, 84 F.3d at 741-43 and n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."); *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996) (necessity of applying individualized choice of law analysis "compounded exponentially" individual issues in class action because states had "different rules governing the whole range of issues raised by the plaintiff's claims"), *aff'd*, 521 U.S. 591 (1997); *Ex parte Green Tree Fin. Corp.*, 723 So.2d 6 (Ala. 1998) ("we have grave concerns as to whether any national class of plaintiffs in an action involving the application of the differing laws of numerous states can satisfy" the requirements of predominance and superiority); *Chin*, 182 F.R.D. at 461 (declining to certify class which would require the application of the laws of all fifty states; "it remains true that no federal court has attempted to try a case under the laws of every state").

The Eleventh Circuit applied mainstream law when it refused to sustain a certification order that was premised on an unfounded assumption that the gambling laws of all fifty states were similar. *See Walsh*, 807 F.2d at 1017 (class proponent must provide an "extensive analysis" of state law variations regarding all pertinent state law issues, and establish that the application of each state's law would not pose "insuperable

obstacles" to class certification); *Castano*, 84 F.3d at 741-43 (finding district court did not properly consider how variations in state laws might affect predominance inquiry); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564 (5th Cir. 2002) ("A cursory review of state law variations is not sufficient" to establish predominance); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *Spence*, 227 F.3d at 313; *Chin*, 182 F.R.D. at 461; *Martinez v. Weyerhaeuser Mortg. Co.*, 1997 U.S. Dist. LEXIS 22172, *11-12 (S.D. Fla. 1997); *Wilkes v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.)*, 174 F.R.D. 332, 350 (D.N.J. 1997) (plaintiff has the burden of "designing a workable plan for trial embracing all claims and defenses prior to class certification"). *See also Bill Heard Chevrolet Co. v. Dixon*, 2001 Ala. LEXIS 383, *18 (Ala. 2001); *Washington Mutual Bank v. Superior Court*, 15 P.3d 1071, 1085 (Cal. 2001); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

The Eleventh Circuit's decision represents a straightforward application of this well-established legal standard. Because Petitioners made no attempt in the district court to demonstrate affirmatively that the gambling laws of all fifty states could be manageably applied, it was legal error for the district court to assume that this Rule 23 requirement was met.[18] *See Andrews*, 95 F.3d at 1024 ("'class action proponents must

18. Petitioner's failure is understandable since even a cursory review of gambling statutes and related laws reveals that states vary considerably as to whether, and under what circumstances, recovery for a gambling debt may be had, the level of scienter which must be proven, and how the elements of prize, chance and consideration are interpreted. *Compare Glick v. MTV Networks*, 796 F. Supp. 743, 748 (S.D.N.Y. 1992) (alternative free method of entry removed 900-number promotion from ambit of New Jersey's gambling or lottery laws) with *State v. Schubert Theatre Players Co.*, 281 N.W. 369 (Minn. 1938) (drawing was illegal despite free method of entry). Indeed, in rendering judgment on the individual claims in *Andrews*, the district court concluded that the 900-number programs at issue violated Georgia's and Nebraska's gambling laws, but not the gambling laws of California.

do more than merely assert that variations in state law are insignificant or 'academic'; court cannot take class proponents' interpretations of law 'on faith.'"") (citation omitted); *Walsh*, 807 F.2d at 1016 (to justify class treatment, class action proponent must show that no variations in applicable states' laws exist); *Wilkes*, 174 F.R.D. at 342 (denying certification where Petitioners failed to demonstrate realistic plan for trying class claims that arose under differing states' laws); *In re Stucco Litig.*, 175 F.R.D. 210, 216 (E.D.N.C. 1997) (although plaintiff suggested that state law differences were minor, "[t]he devil . . . is in the details").[19]

Indeed, Petitioners made no attempt before the Eleventh Circuit to support the district court's conclusion that it could manageably apply the gambling laws of all fifty states. Instead, Petitioners argued that the district court's choice of law analysis was erroneous and that, at most, the gambling laws of four states would be applicable, a task Petitioners claimed would be manageable.[20] As the Eleventh Circuit recognized, however, Petitioners failed to preserve this choice of law issue on appeal due to their failure to file a cross-appeal as required by Fed. R. App. P. 5(b)(2). *Sikes*, 281 F.3d at 1367 n.44. Having

19. In an effort to bolster their claim that this case can be effectively managed, Petitioners erroneously suggest that the parties jointly agreed to have this case tried by the district court. (Petition at 8). In fact, having demanded a jury trial in their initial pleadings, Petitioners sought to withdraw that demand after the Eleventh Circuit rendered its decision in *Andrews* by filing amended responses to the Southern District's mandatory interrogatories stating that they desired a non-jury trial. (*See* Petition App. at 103, 108 (Plaintiffs' 3/10/97 Supplemental Responses to Rule 8.6 Interrogatories)). This unilateral attempt to avoid a trial by jury, more than four years after having demanded a jury trial and after the district court certified the class based on that demand, contravenes Fed. R. Civ. P. 39(a) and is ineffectual. *See, e.g., Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 903-04 (5th Cir. 1972).

20. Before this Court, Petitioners contend that the gambling laws of only two states, Missouri and Illinois, need to be applied to the claims of class members nationwide. (Petition at 27).

failed to argue before the Eleventh Circuit that the district court correctly concluded that the gambling laws of all fifty states could be manageably applied, this issue presents no basis for review by this Court.

## CONCLUSION

This case presents no issue that merits this Court's attention or review. The Eleventh Circuit's decision involves the application of well-established legal principles and is consistent with other Circuit Court decisions.

Respectfully submitted,

WYCK A. KNOX, JR.
TED H. CLARKSON
KILPATRICK STOCKTON LLP
Post Office Box 2043
Augusta, GA 30903
(706) 724-2622

LAURA A. KASTER
AT&T CORP.
295 North Maple Avenue
Room 1138L2
Basking Ridge, NJ 07920
(908) 221-4838

WILLIAM N. WITHROW, JR.
*Counsel of Record*
C. LEEANN MCCURRY
TROUTMAN SANDERS LLP
5200 NationsBank Plaza
600 Peachtree Street
Atlanta, GA 30308-2216
(404) 885-3000

*Attorneys for AT&T Corp.*